STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, a Michigan Non-Profit Corporation,

Plaintiff/Appellant,

v

KATHLEEN M. WILBUR, Director of the Michigan Department of Consumer & Industry Services and NORMAN W. DONKER, Midland County Prosecuting Attorney,

Defendants/Appellees,

and

MICHIGAN STATE BUILDING & CONSTRUCTION TRADES COUNCIL,

Intervenor/Defendant/Appellee,

and

MICHIGAN CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Michigan corporation, MICHIGAN MECHANICAL CONTRACTORS ASSOCIATION, a Michigan corporation, and MICHIGAN CHAPTER OF THE SHEET METAL AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, a Michigan corporation,

Intervenors/Defendants/Appellees,

and

MICHAEL D. THOMAS, Saginaw County Prosecuting Attorney,

Intervenor/Appellee.
_____/

Supreme Court No. 124835

Court of Appeals No. 234037

Midland County Circuit Court Case No. 00-2512-CL

124835

DEFENDANT/APPELLEE WILBUR'S BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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Dated: November 10, 2003

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QUESTION PRESENTED FOR REVIEW

I. **Whether this Court should decline to address the hypothetical issues raised by Plaintiff/Appellant involving vagueness and delegation of legislative authority, where, as here, no live controversy exists.**

Defendant/Appellee answers: "Yes."

Plaintiff/Appellant answers: "No."

COUNTER-STATEMENT OF JUDGMENT APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

This is an Application for Leave to Appeal filed by Plaintiff/Appellant (Plaintiff) Associated Builders and Contractors, Saginaw Valley Area Chapter from the Opinion issued by the Court of Appeals on August 5, 2003 and Order Denying Rehearing entered by the Court of Appeals on September 29, 2003. The Court held that the Circuit Court lacked subject matter jurisdiction over Plaintiff's Complaint for Declaratory and Injunctive Relief involving the constitutionality of the Prevailing Wage Act, MCL 408.551 *et seq* because the injuries alleged by the Plaintiff are speculative and hypothetical and therefore there is no actual controversy. The Court of Appeals, therefore, affirmed the Order of the Circuit Court granting summary disposition as to Count I of the Complaint and reversed the Order of the Circuit Court denying summary disposition as to Count II of the Complaint.

The decision of the Court of Appeals is correct and the Application for Leave to Appeal should be denied. Plaintiff and its members have failed to show that they have suffered any injuries or the threat of injuries as the result of the application of the Prevailing Wage Act. In the absence of an actual controversy, the Court lacks subject matter jurisdiction.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Defendant/Appellee (State Defendant) Kathleen M. Wilbur, former Director of the Michigan Department of Consumer and Industry Services (CIS) rejects Plaintiff/Appellee (Plaintiff) Associated Builders and Contractors, Saginaw Valley Area Chapter's (ABC) Statement of Facts because it is argumentative, conclusory and states allegations and refers to matters not of record. Indeed, ABC's fifty (50) page brief is replete with items not of record in this proceeding.

Introduction

The Prevailing Wage Act (PWA), MCL 408.551 *et seq* was enacted in 1966 and is patterned on the Davis-Bacon Act of 1931. 40 USC 276a *et seq*. The PWA requires that prevailing wages and fringe benefits be paid on certain state sponsored or financed construction projects. Section 4 of the PWA, MCL 408.554, in pertinent part, states:

> The commissioner shall establish prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employers. Such agreements and understandings, to meet the requirements of this section, shall not be controlled in any way by either an employee or employer organization. If the prevailing rates of wages and fringe benefits cannot reasonably and fairly be applied in any locality because no such agreements or understandings exist, the commissioner shall determine the rates and fringe benefits for the same or most similar employment in the nearest and most similar neighboring locality in which such agreements or understandings do exist. [Emphasis added.]

Thus, CIS is bound by the wage and benefit rates including overtime rates which are found in local collective bargaining agreements. See, *Michigan State Building & Construction Trades Council v Perry*, 241 Mich App 406, 412-413; 616 NW2d 697 (2000). CIS annually determines the rates from collective bargaining agreements submitted to the Department and from rate survey reports that represent collectively bargained rates of pay for construction mechanics. (See Affidavit of Judith Huhn, attached to State Defendant Wilbur's Motion for

Summary Disposition and Court of Appeals Opinion at pp 5-6). The prevailing wage and fringe benefit rates determined by CIS correspond to job classifications that are also derived from the rate surveys and collective bargaining agreements. (*Id.*)

In *Western Michigan University Board of Control v State of Michigan,* 455 Mich 531; 565 NW2d 828 (1997), this Court articulated the purpose of the Prevailing Wage Act, in the following manner.

> Michigan's prevailing wage act is generally patterned after the federal prevailing wage act, also known as the Davis-Bacon Act. 40 USC 276a et seq. Both the federal and Michigan acts serve to protect employees of government contractors from substandard wages. Federal courts have explained the public policy underlying the federal act as
>
> > 'protect[ing] local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area' ... [and] 'giv[ing] local labor and the local contractor a fair opportunity to participate in this building program' [Universities Research Ass'n, Inc v Coutu, 450 US 754, 773-774; 101 S Ct 1451; 67 L Ed 2d 662 (1981).]
> >
> > The purposes of the Davis-Bacon Act are to protect the employees of Government contractors from substandard wages and to promote the hiring of local labor rather than cheap labor from distant sources. [North Georgia Bldg & Construction Trades Council v Goldschmidt, 621 F2d 697, 702 (CA 5, 1980).]
>
> The Michigan prevailing wage act reflects these same public policy concerns. Through its exercise of the sovereign police power to regulate the terms and conditions of employment for the welfare of Michigan workers, the Michigan Legislature has required that certain contracts for state projects must contain a provision requiring the contractor to pay the prevailing wages and fringe benefits to workers on qualifying projects. 455 Mich at 535-536. [(Footnote omitted.)]

Construction contractors are required to comply with all of the provisions of the PWA and failure to do so under MCL 408.557 constitutes a misdemeanor.

FACTS

Plaintiff/Appellee (Plaintiff), Associated Builders and Contractors, Saginaw Valley Area Chapter (ABC) is a non-union trade association of construction contractors. (Complaint, ¶ 8). ABC's membership consists of general contractors, subcontractors, builders and suppliers doing business in the construction industry. (Complaint, ¶ 8). Plaintiff has an office located in Midland County and has members who are located in Midland County. (Complaint, ¶ 13).

Defendant-Appellee (State Defendant) Kathleen M. Wilbur is the former Director of the Michigan Department of Consumer and Industry Services. (Complaint, ¶¶ 9-10). As the Director, Ms. Wilbur administered the Prevailing Wage Act and is named only in her official capacity. Defendant Norman W. Donker is the prosecutor of Midland County. (Complaint, ¶ 10). He is not participating in this application for leave to appeal.

Intervenors/Defendants/Appellees (Association Intervenors) Michigan Chapter of the National Electrical Contractors Association, Inc. (Michigan NECA), Michigan Mechanical Contractors Association (Michigan MCA), and the Michigan Chapter of the Sheet Metal Air Conditioning Contractors National Association (Michigan SMACNA) represent contractors engaged in various trades in the construction industry. The contractors authorizing Michigan NECA, Michigan MCA and Michigan SMACNA to bargain on their behalf are subject to the provisions of the PWA in the same manner that Plaintiff's members are subject to the PWA.

Intervenor/ Defendant/Appellee (Council Intervenor) Michigan State Building & Construction Trades Council represents numerous building and construction trade unions in the State of Michigan, whose construction worker members are, employed on both public and private construction projects throughout the State. Council Intervenor's construction worker members receive wages and fringe benefits consistent with the PWA on public construction projects.

Intervenor/Appellee Michael D. Thomas is the Prosecutor of Saginaw County.

In the Complaint for Declaratory and Injunctive Relief, Plaintiff alleges that the PWA is unconstitutional. First, in Count I of the Complaint, it contends that the PWA is unconstitutionally vague and, therefore, violates due process under Const 1963, art 1, § 17. Second, in Count II of the Complaint, it contends that the Prevailing Wage Act is an unlawful delegation of legislative power under Const 1963, art 4, § 1, because it delegates the authority to determine prevailing wage rates to private persons and, therefore, is unconstitutional. Plaintiff requested that the Court declare the PWA unconstitutional and enjoin the State Defendant and the County Defendant from enforcing the PWA.

On August 3, 2000, State Defendant filed a Motion for Summary Disposition under MCR 2.116(C)(4)(8) and (10) on the ground, *inter alia,* that Plaintiff's Complaint, in its entirety, failed to state a claim upon which relief can be granted. Both Intervenors filed similar motions on September 20, 2000 and November 10, 2000, respectively.

In addition, on September 7, 2000, Defendant Donker filed a Motion for Summary Disposition under MCR 2.116(C)(4)(8) and (10) contending, *inter alia,* that the Complaint for Declaratory Judgment should fail because Plaintiff had failed to assert "the existence of an actual controversy." (Defendant Donker's Motion for Summary Disposition, ¶ 7). In his affidavit in support of the Motion, Prosecutor Donker stated that during his entire tenure in the Office of Prosecuting Attorney, 1981-2000, a complaint for a violation of the PWA had neither been requested nor issued. (Donker Affidavit, ¶ 3). The Honorable Thomas L. Ludington, Midland County Circuit Court Judge, issued an Opinion on December 15, 2000 denying Donker's Motion.

The State Defendant and Intervenors' motions were heard and argued on February 8, 2001 before the Judge Ludington. On March 20, 2001, the Court, in a written opinion, held that the PWA is not impermissibly vague. Judge Ludington found that Section 2 of the PWA clearly requires a contractor to pay prevailing wages and fringe benefits on state projects. (Opinion, p 25). The Court also concluded that issues of fact exist as to whether the PWA unconstitutionally delegates legislative authority to private parties in violation of Const 1963, art 4, § 1. The lower court issued its Order granting summary disposition as to Count I of the Complaint (the vagueness claim) and denying summary disposition as to Count II of the Complaint (the unlawful delegation claim) on April 10, 2001.

Subsequently, on May 1, 2001, Association Intervenors and Counsel Intervenor filed in the Court of Appeals a Joint Application for Leave to Appeal of the lower court's Order denying summary disposition as to Count II of the Complaint. On June 27, 2001, the Court of Appeals entered its Order granting the Application for Leave to Appeal filed by Association Intervenors and Counsel Intervenor. Thereafter, on July 16, 2001, ABC filed a cross-appeal under MCR 7.207(A)(1) appealing the portion of the lower court Order which dismissed Count I of the Complaint alleging that the PWA is unconstitutionally vague.

On August 5, 2003, the Court of Appeals issued its decision reversing in part and affirming in part the Order of the Circuit Court. The Court of Appeals affirmed the Order of the Circuit Court granting summary disposition as to Count I of the Complaint and reversed the Order of the Circuit Court denying summary disposition as to Count II of the Complaint. The Court of Appeals concluded that the Circuit Court lacked subject matter jurisdiction to enter a declaratory judgment because Plaintiff had failed to establish "that there was an actual or imminently threatened prosecution of any of its members, nor has Plaintiff shown that a

declaratory judgment or decree is necessary to guide its future conduct in order to preserve its legal rights with respect to any particular contract or bid." (Court of Appeals Opinion at p14). The Court of Appeals further ruled that it was not necessary to address the question of the constitutionality of the PWA "because the injuries Plaintiff seeks to prevent are at this point merely hypothetical..." (*Id.* at p 2). Thus, the issues of vagueness and unlawful delegation were not specifically decided by the Court of Appeals. ABC thereafter filed a Motion for Rehearing that was denied by the Court of Appeals on September 29, 2003.

This brief is filed on behalf of State Defendant Kathleen M. Wilbur in support of the Court of Appeals decision dismissing Plaintiff's Complaint in its entirety for lack of subject matter jurisdiction.

Standard Of Review

Review of a trial court's determination regarding a motion for summary disposition is *de novo. Parcher v Detroit Edison Co.,* 209 Mich App 495; 497; 531 NW2d 724 (1995), *aff'd* 454 Mich 644; 557 NW2d 287 (1996). Questions of law as to the constitutionality of a statute are also reviewed *de novo* on appeal. *McDougall v Schanz,* 461 Mich 15, 23; 597 NW2d 148 (1999).

Whether a statute is constitutional is a question of law, which is reviewed *de novo. Michigan State Employees Ass'n v Michigan Liquor Control Comm'n,* 232 Mich App 456, 463; 591 NW2d 353 (1998) (citing *Sills v Oakland Gen. Hosp,* 220 Mich App 303, 311; 559 NW2d 348 (1996). Legislation is presumed to be constitutional. *Caterpillar, Inc. v Dep't of Treasury,* 440 Mich 400, 413; 488 NW2d 182, *cert den,* 506 US 1014 (1992) ("Legislation that is challenged on constitutional grounds is 'clothed in a presumption of constitutionality.'") (quoting *Cruz v Chevrolet Grey Iron Div. of General Motors Corp.,* 398 Mich 117, 127; 247 NW2d 764 (1976)) "A statute is presumed constitutional absent a clear showing to the contrary." *Id.* (citing *Lehnhausen v Lake Shore Auto Parts,* 410 US 356; 93 S Ct 1001, 35 L Ed 2d 351 (1973)) *see also, Gora v City of Ferndale,* 456 Mich 704, 711; 576 NW2d 141 (1998) ("Statutes and ordinances must be construed in a constitutional manner if possible.") (citing *Detroit v Qualls,* 434 Mich 340, 364; 454 NW2d 374 (1990).

ARGUMENT

I. This Court should decline to address the hypothetical issues raised by Plaintiff/Appellant involving vagueness and delegation of legislative authority, where, as here, no live controversy exists.

The Court of Appeals correctly concluded that there was no actual case or controversy before it. In doing so, the Court noted that MCR 2.605 provides that a court may exercise jurisdiction over a declaratory judgment action if there is an actual controversy. The court rule provides:

> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> (2) For purposes of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

For purpose of declaratory judgments, an actual controversy exists where the declaratory judgment is necessary to guide a party's future conduct to preserve his or her legal rights. *Hofmann v Auto Club Insurance Association,* 211 Mich App 55, 97; 536 NW2d 529 (1995). Similarly, there must be "a genuine, live controversy between the interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations." *Allstate Insurance Co v Hayes,* 442 Mich 56, 65; 499 NW2d 743 (1993).

Mere hypothetical injuries do not constitute actual controversies; rather, there must be an actual injury or loss. *McGill v Automobile Ass'n of Michigan*, 207 Mich App 402, 407; 526 NW2d 12 (1994). *McGill* involved a declaratory judgment action by plaintiffs to compel defendant insurance companies to pay the plaintiffs' fully billed medical expenses rather than their reasonable medical expenses. 207 Mich App at 405, 407. Defendant insurance companies only paid a reasonable portion of plaintiffs' medical expenses. *Id.* at 404. The difference

between the cost of plaintiffs' fully billed medical expenses and costs of their reasonable medical expenses was not paid. Because a portion of their medical bills was not paid, the plaintiffs argued that an actual controversy existed by virtue of their legal liability for the remaining unpaid bills. The Court of Appeals, however, concluded that the plaintiffs' alleged vulnerability to lawsuits from hospitals seeking full payment was hypothetical and, therefore, no actual controversy existed. *Id.* at 407.

Judge (now Justice) Taylor concluded:

> Our review of the record reveals no evidence that plaintiffs have suffered injury as a result of defendants' partial payment of their medical bills; nor is any injury threatened. Where no case or actual controversy exists, the circuit court lacks subject-matter jurisdiction to enter a declaratory judgment. *Shavers v Attorney General,* 402 Mich 554, 558; 267 NW2d 72 (1978). A case or actual controversy does not exist where the injuries sought to be prevented are merely hypothetical; there must be an actual injury or loss. *Id.* Therefore, we hold that the trial court properly granted defendants' motion for summary disposition. 207 Mich App at 407.

Just as the fear of being sued in *McGill* does not state an actual controversy, the same is true with the instant action. Specifically, Plaintiff's alleged actual controversy is hypothetical and speculative for the following reasons: (1) no evidence of a threatened, pending or actual prosecution by Defendant Wilbur or Defendant Thomas; (2) no evidence that ABC's members intend to violate the Prevailing Wage Act, unlike the situation in *Strager v Wayne County Prosecuting Attorney,* 10 Mich App 166; 159 NW2d 175 (1968); (3) no evidence that ABC and its members have violated the Prevailing Wage Act; and (4) no evidence that ABC and its members are in the process of bidding on a project covered by the Prevailing Wage Act.

In other words, Plaintiffs' claims are not based on actual harm or even threatened harm. Rather, they are based on pure speculation concerning how Defendant Wilbur and Prosecutor

Thomas will act if called upon to do so. Until there has been a violation of the Prevailing Wage Act or a threat of a violation, there is no actual controversy.

In *Recall Blanchard Committee v Secretary of State,* 146 Mich App 117; 380 NW2d 71 (1985), *lv den* 424 Mich 875 (1986), the Plaintiff sought a declaratory judgment that eight provisions of the Michigan Election Law pertaining to the recall process were unconstitutional because they allegedly limited the ability of an individual to place upon the ballot the question of recall of an elected public official. The Recall Blanchard Committee, which was seeking the recall of Governor Blanchard, however, did not challenge the minimum number of signatures required for a recall petition and did not submit any recall petitions with the Secretary of State for counting or verification. The Court held that an actual controversy did not exist because Plaintiff had failed to file any signatures with the Secretary of State relative to its efforts to recall the Governor. In reaching the result, the Court, *id.* at 123, stated:

> Here, the minimum number of signatures required has been acknowledged by the Committee to be 760,002. There has been no evidence presented that the Committee has submitted, as yet, *any* signatures for counting or verification. Accordingly, no petition has been rejected by the Secretary of State as being insufficient on the basis of any of the challenged statutory provisions. Therefore, any actual injury or losses have not yet occurred and are contingent on the Committee's filing of petitions with the Secretary of State. (Emphasis added)

In this case, like *Recall Blanchard Committee,* ABC's constitutional challenges are merely conjectural and speculative. ABC has failed to establish an actual or imminent concrete and particularized injury. *Lee v Macomb County Board of Commissioners,* 464 Mich 726, 739; 629 NW2d 900 (2001). Until ABC can present evidence beyond "hypothetical areas of possible future confrontation", the Court lacks subject matter jurisdiction. (Court of Appeals Opinion, p 8, quoting *BCBSM v Governor,* 422 Mich 1, 93; 367 NW2d 1 (1985).

Similarly, in *McLeod v McLeod,* 365 Mich 25; 112 NW2d 227 (1961), a father allegedly made an oral agreement to bequeath certain interests in real property to his son, the plaintiff, and that if the father remarried a prenuptial agreement would be prepared to effectuate the agreement. 365 Mich at 28. While the father remarried, he did not prepare the prenuptial agreement. *Id.* Additionally, the father's will had a provision that would disinherit any beneficiary who contests the will. *Id.* at 29. Thus, the son sought a declaratory judgment as to whether an attempt to enforce the oral argument with his father would trigger the disinheritance clause in his father's will.

Among others, the *McLeod* Court listed the following principles guiding declaratory judgment actions:

(1) Exercise of jurisdiction is discretionary;

(2) Actual and bona fide controversy;

(3) Future rights will not be decided absent unique circumstances; and

(4) Declaratory judgments will not be issued when the plaintiff's interest is contingent upon the happening of some event.

McLeod, 365 Mich at 31-32.

In rejecting plaintiff's declaratory judgment action, the Court held that the legal question, *i.e.,* whether the son will be disinherited, is contingent upon his filing of a lawsuit to enforce the oral agreement. *Id.* at 34. Likewise, there was no actual controversy.

Finally, although it was not necessary to address the vagueness and delegation issues, the Court of Appeals did not err in doing so. The legislative purpose of the Prevailing Wage Act and the manner in which the Act operates are clear and unambiguous contrary to the allegations raised by ABC. While the Act has been the subject of numerous constitutional challenges, the Courts have had no trouble construing and upholding the provisions of the PWA. *Michigan*

State Building & Construction Trades Council v Perry, supra; *Associated Builders & Contractors, Saginaw Valley Area Chapter v Perry,* 115 F3d 386 (CA 6, 1997); *Western Michigan University Board of Control v State of Michigan, supra*; *West Ottawa Public Schools v Director, Department of Labor,* 107 Mich App 237; 309 NW2d 220 (1981), *lv den,* 413 Mich 917 (1982).

In *People v Howell*, 396 Mich 16, 20; 238 NW2d 148 (1976), this Court set forth the following three criteria for determining whether a statute is void for vagueness:

> 1. It does not provide fair notice of the conduct prescribed.
>
> 2. It confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed.
>
> 3. Its coverage is overbroad and impinges on First Amendment freedoms.

The Prevailing Wage Act provides fair notice of who sets the prevailing wage and fringe benefit rates, how the rates are determined, what projects come within the meaning of the Act and what type of contractual language is to be included in a contract for state construction projects where prevailing wages and fringe benefit rates must be paid. The claim that the Act is unconstitutionally vague is without merit.

Likewise, Plaintiffs delegation claim is also without merit. In *West Ottawa Public Schools v Director, Department of Labor, supra,* the Court of Appeals rejected a claim that the Prevailing Wage Act is unconstitutional under Const 1963, art 4, § 1. In reaching that result, the Court stated:

> The Michigan Legislature has not delegated any legislative, policy-making authority to the Department of Labor. The Legislature has declared as the policy of this state that construction workers on public projects are to be paid the equivalent of the union wage in the locality. The Department of Labor's determination of that prevailing wage does not amount to the setting of any state policy. The Department is merely authorized to implement what the Legislature has already declared to be the law in Michigan.

> There is a vital distinction between conferring the power of making what is essentially a legislative determination on private parties and adopting what private parties do in an independent and unrelated enterprise.

107 Mich App at 245-246.

This Court reached a similar result in *Taylor v Gate Pharmaceuticals,* 468 Mich 1; 658 NW2d 127 (2003). In that case, plaintiffs claimed that the involved statute, MCL 600.2946(5), impermissibly delegated legislative authority to the FDA as the final arbiter of drug safety in Michigan. This Court held that under the independent significant standard, the statute was constitutional because it "delegate[d] nothing to the FDA..." 468 Mich at 19. On the contrary, the statute "uses independently significant decisions of the FDA as a measuring device to set the standard of care for manufacturers and sellers of prescription drugs in Michigan." *Id.*

Here, the legislature has established a public policy that prevailing wage rates on state construction projects shall be at the same rates as are paid under collective bargaining agreements. It has delegated to the Director of the Department of Consumer and Industry Services the task of ascertaining the changing monetary value of those rates. The contention that requiring Defendant to look to collective bargaining agreements and ascertaining that value unlawfully delegates power to private persons to fix the rate itself is without merit.

In sum, the decision of the Court of Appeals holding that it lacks subject matter jurisdiction over Plaintiff's complaint is not clearly erroneous. ABC's claims are without merit and should also be rejected by this Court.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Defendant/Appellee Kathleen M. Wilbur, Director of the Michigan Department of Consumer and Industry Services, respectfully requests this Honorable Court to enter its Order denying the Application for Leave to Appeal.

Respectfully submitted,

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Dated: November 10, 2003
cases/00/200056812C/brief